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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1076

JOHN R. BEALL

Petitioner,

v.

BOB T. JEFFERSON

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA, TEXAS

CURTIS E. HILL
605 North Ervay,
Dallas 1, Texas,
Counsel for Petitioner

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA, TEXAS

To The Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari be issued to review a judgment and order, entered on August 17, 1965, overruling peitioner's motion for rehearing of a judgment entered on July 27, 1965, by the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas.

CITATION TO OPINIONS BELOW

The opinion of the Court of Civil Appeals, which it ordered not to be published, is printed in Appendix I hereto and is shown in the record (R-Vol. 3-page 75).

JURISDICTION

The judgment of the Court of Civil Appeals was entered on July 27, 1965, a copy of which is attached hereto in Exhibit IV and is shown in the record (R-Vol. 3-page 80). Rehearing was overruled on August 17, 1965, a copy of the order overruling same is attached hereto in Exhibit IV and is shown in the record (R-Vol. 3-page 89). Application to the Supreme Court of Texas for writ of error to the Court of Civil Appeals was dismissed for want of jurisdiction on November 3, 1965, a copy of the order of dismissal is attached hereto in Exhibit V and is shown in the record (R-Vol. 3-page 170). Rehearing of such order and application for writ of error was overruled on December 1, 1965, a copy of the order overruling same is attached hereto in Exhibit V and is shown in the record (R-Vol. 3-page 170). The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3). Hence the Court of Civil Appeals of Texas is the highest Court of the State of Texas in which a decision could be had within the meaning of 28 U. S. C. as construed by this Honorable Court in Michigan-Wisconsin Pipe Line Co. v. Calvert (1954) U. S. Tex., 347 U. S. 157, rehearing denied; Panhandle Eastern Pipe Line Co. v. Calvert (1954), 347 U. S. 931 and Michigan-Wisconsin Pipe Line Co. v. Calvert (1954) 347 U. S. 931.

That petitioner had been deprived of due process of law in the state judicial proceedings became known to petitioner for the first time shortly after November 3, 1965, when petitioner learned that his application for writ of error to the Supreme Court of Texas had been dismissed by the Supreme Court of Texas for want of jurisdiction for the reason that petitioner's then counsel had not presented in petitioner's motion for rehearing in the Court of Civil Appeals, the points of error which said counsel had attempted to present to the Supreme Court of Texas in petitioner's application for writ of error to the Supreme Court of Texas (See Appendix II hereto and R-Vol. 3-page 153). Immediately thereupon, petitioner discharged his then counsel, employed the undersigned counsel to thenceforth represent him, petitioner, in the further course of this litigation and through his replacing counsel, in Petitioner's Motion for Rehearing of the Order of November 3, 1965, Dismissing his Application for Writ of Error for Want of Jurisdiction and of the Cause, presented to the Supreme Court of Texas at the first and only opportunity that he had before any court of the state judicial system of the State of Texas, that he, petitioner, had been deprived of due process of law (See Appendix III attached hereto and R-Vol. 3-page 160).

QUESTIONS PRESENTED

(1) Whether the failure of petitioner's former counsel to present in petitioner's motion for rehearing in the Court of Civil Appeals the points of error which said counsel attempted to present to the Supreme Court of Texas in petitioner's application for writ of error to the Supreme Court

of Texas and the dismissal by the Supreme Court of Texas of petitioner's application for writ of error for want of jurisdiction on account of such failure of petitioner's former counsel, deprived petitioner of due process of law, and

(2) Whether the failure of petitioner's former counsel to present in the pleadings on which the cause was tried the defensive theory and operative facts of record herein which support such defensive theory, towit, *if petitioner in diagnosing and treating respondent's wife as to and for pregnancy, implemented a method of diagnosis and treatment which any segment of persons who at such time practiced the same theory of medicine which petitioner had licence to practice and practiced, then petitioner would not be liable for misdiagnosis and treatment of respondent's wife as to her pregnancy* and said counsel's further failure to implement throughout the course of the litigation in the state judicial system of Texas, the established procedural methods for efficacious presentation at each and every subsequent occasion therefor to every court of the state judicial system through which such litigation was implemented such defensive theory and operative facts and the failure of the Supreme Court of Texas, when such failure of petitioner's counsel, was presented to it, the Supreme Court of Texas in Petitioner's Motion for Rehearing of the Order of November 3, 1965, Dismissing his Application for Writ of Error for Want of Jurisdiction and of the Cause, to act affirmatively to correct such failure of petitioner's former counsel, deprived petitioner of due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI and the Fourteenth Amendment to the Constitution of the United States are involved herein.

STATEMENT

Respondent, Bob T. Jefferson, sued petitioner, Dr. John R. Beall, a licensed doctor of the allopathic school and theory of medical science, for damages alleged to have resulted to Alta Lee Jefferson, respondent's wife, on account of the negligence of said Dr. Beall in diagnosing her to be pregnant, when, under the findings of the jury, she, in fact, was not pregnant. Throughout the course of the litigation, from and including the trial court, to and including the Supreme Court of Texas, petitioner's counsel presented petitioner's defense as if petitioner's acts of conduct under judicial inquiry were not done in the course of, and in implementation of, an objective of his professional skill and work but as if petitioner's acts of conduct under judicial inquiry had been done by him as an unskilled worker in the course of, and in implementation of, an objective usually undertaken by an unskilled person. In such circumstances the operative facts of the cause of action asserted by respondent, subjected petitioner to the emotionalism, whim and caprice of the jury, who were entirely laic to the science and theories of medicine and deprived petitioner of the rights under law which make it possible for members of our society to have medical services. All issues of ordinary negligence were found by said jury against petitioner, just as will always be done in every case having similar facts, where persons are not afforded but are

deprived of the rights under law which are contended for by petitioner herein. Such failure of petitioner's former counsel culminated in his not presenting assignments of error in his motion for rehearing in the Court of Civil Appeals, which under existing and controlling rules of law, presumably known to petitioner's said former counsel, inevitably would—and did—prevent review by the Supreme Court of Texas of the litigation and judgment against petitioner, even on the ordinary negligence theory, which said former counsel for petitioner, had made a very poor effort to present.

REASONS FOR GRANTING THE WRIT

No civilized society can obtain as such without the services of skilled physicians and surgeons. Skilled physicians and surgeons cannot and will not practice medical skills and surgery if the method of law with respect to their liability is that which was controlling of the judicial process as same has been implemented against petitioner in the state court judicial proceedings which petitioner by these certiorari proceedings seeks to have reviewed. The Hammurabi code of "an eye for an eye and a tooth for a tooth" as the legal due of persons practicing medical science in the circumstances of Hammurabi's time, was no more deterrent then of such persons than would be the rule of law upon which this litigation was tried as to petitioner, should such now become the rule of law generally in our present societal system as to persons who now practice medical science.

Establishment and implementation by judicial decision by a state judicial system of a rule of law which is funda-

mentally inimical to our total method of societal system, may constitute state action and deprivation of due process of law. New York Times Company v. Sullivan, 376 U.S. 254. Ineffective assistance of counsel may constitute state action and deprivation of due process of law Grandsinger v. Bovey, (D. C. Neb.) 153 F. Supp 201, affirmed 253 F. 2d 917, certiorari denied 357 U. S. 929. See also Effective Assistance of Counsel, 1963 Virginia Law Review, Vol. XLIX, page 1531 et seq., Turner vs. Maryland, 303 F. 2d 507 (4th Cir. 1962); Turner vs. Maryland, 318 F. 2d 852 (4th Cir. 1963).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfuly Submitted,

CURTIS E. HILL
605 North Ervay,
Dallas 1, Texas,
Counsel for Petitioner.

I certify that a copy of the foregoing petition for writ of certiorari has been mailed, on the 1st day of March, A.D., 1966, to Honorable Dan W. Stansbury, 2110 Republic National Bank Tower, Dallas 1, Texas, and Honorable William F. Tucker, 336 Fidelity Union Tower Building, Dallas 1, Texas, who are counsel of record for respondent.

CURTIS E. HILL

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APPENDIX I

NO. 7659

COURT OF CIVIL APPEALS
Sixth District, Texarkana, Texas

JOHN R. BEALL,

Appellant,

v.

BOB T. JEFFERSON,

Appellee.

Appeal from the District Court of Dallas County,
95th Judicial District of Texas.

Bob T. Jefferson, husband of Alta Lee Jefferson, sued Dr. John R. Beall, M.D., for damages allegedly resulting from defendant's negligence in diagnosing and treating plaintiff's wife. A jury in the case answered the liability and damage issues favorable to plaintiff and a judgment was entered for plaintiff. Defendant has appealed.

Appellant presents three points on appeal, as follows:

"FIRST POINT"

"The Court erred in overruling Appellant's Motion for New Trial because there was a total absence of any evidence to support the jury's finding that Appellee's wife was not pregnant on the occasion in question.

"SECOND POINT"

"The Court erred in overruling Appellant's Motion for New Trial because there was a total absence of any evidence establishing causal connection between the negligent acts complained of and the damages found.

"THIRD POINT"

"The Court erred in overruling Appellant's Motion for New Trial because there was a total absence of any evidence showing physical harm to have been sustained by Appellee's wife, or any malice in the acts of Appellant."

Appellee's wife contacted appellant, a medical doctor, on October 29, 1961, at appellant's clinic in Dallas, at which time she was complaining of a sick stomach and related to said doctor that she had failed to have a normal menstrual period a month or two before; appellant kept her in his clinic overnight and the following morning informed her she was pregnant and requested her to return approximately every three weeks. Appellant thereafter continued to see appellee's wife and at various times during his care of her she noticed spots of blood which she believed to be the beginning of her menstrual period. On these occasions appellant would administer drugs and treatment to stop the bleeding. Appellee's wife became doubtful as to whether she was pregnant, but was assured by Dr. Beall that she was, and became convinced that she would have a child.

During the latter stages of her diagnosed pergnancy she was confined to appellant's hospital on March 4, April 12 and April 18, 1962. On both occasions in April, 1962, she was prepared by appellant's nurses for delivery.

On April 18, 1962, Mrs. Jefferson was caused to lie in bed and watched by appellant's nurse until she had purportedly dilated enough to deliver a child. The following morning Mrs. Jefferson had still failed to deliver a child, and the appellant for the first time administered an objective test to determine

the state of her diagnosed pregnancy. This consisted of an x-ray, and the x-ray revealed nothing in the womb. Appellant then informed Mrs. Jefferson that she was not pregnant, and she then became hysterical and thereafter suffered much mental anguish and pain. Mrs. Jefferson had already suffered much physical pain, according to her testimony, from the treatment given her by Dr. Beall in his clinic for her diagnosed alleged pregnancy. The following day Mrs. Jefferson saw Dr. Pink, M.D., who examined her at that time and found no sign of pregnancy or recent pregnancy.

In answer to special issues submitted, the jury found to the effect that appellant made a diagnosis that Mrs. Jefferson was pregnant on October 29, 1961; that appellant continued until April 19, 1962, to maintain such diagnosis; that Mrs. Jefferson was not pregnant on the occasion in question; that Mrs. Jefferson suffered physical and mental pain on the occasion in question; that appellant failed to give Mrs. Jefferson a Friedman Test (commonly referred to as a rabbit test) at any time during the time that he was attending her for the alleged pregnancy in question, and that such failure was negligence and a proximate cause of physical and mental pain on the part of Mrs. Jefferson; that appellant failed to attempt to hear and count the pulsations of a fetal heartbeat subsequent to the twentieth week of the alleged pregnancy in quesion, that such failure was negligence and a proximate cause of the physical pain and mental pain on the part of Mrs. Jefferson; that appellant failed to timely use x-ray during the alleged pregnancy in question, that such failure was negligence and a proximate cause of the physical pain

and mental pain on the part of Mrs. Jefferson, and the jury also found monetary damages in favor of appellee.

The testimony of Mrs. Jefferson has been examined and it is evidence of probative force amply sufficient to support the finding of the jury that she was not pregnant on the occasion in question. The testimony of Dr. Pink also corroborates her to the extent that she was not pregnant when he examined her and that he found no sign of recent pregnancy. Dr. Beall's x-ray of April 18, 1962, also confirmed that Mrs. Jefferson was not pregnant at that time and the record shows that this was the only significant test for pregnancy ever made by Dr. Beall to determine whether Mrs. Jefferson was pregnant. Mrs. Jefferson did not deliver a child and she further testified to the effect that she had not miscarried. Appellant's first point is overruled.

It is our further view that there was ample evidence of probative force and that the same was sufficient to sustain the submission of special issues and the jury's findings thereon inquiring as to whether or not (a) appellant's negligence in failing to give appellee's wife a Friedman Test (rabbit test) at any time during the time that he was attending her for the alleged pregnancy in question, (b) appellant's negligence in failing to attempt to hear and count the pulsations of a fetal heartbeat subsequent to the twentieth week of the alleged pregnancy in question and (c) appellant's negligence in failing to timely use x-ray during the alleged pregnancy in question were each a proximate cause of the physical pain and mental pain on the part of Mrs. Jefferson.

As we view the record, Dr. Pink's testimony supports the view that the conduct and omissions on the part of Dr. Beall were negligent and that such negligent acts on the part of Dr. Beall were proximate causes of the physical and mental pain suffered by Mrs. Jefferson. The testimony of Dr. Pink is too lengthy to detail here, but it is deemed to be ample evidence of probative force to sufficiently support the jury's finding of negligence and proximate cause. In concluding his testimony, Dr. Pink stated: "I would have to say I don't see how anybody could have carried through eight months of pregnancy progressively under regular check-ups and the physician not knowing exactly what was going on the whole time."

Mrs. Jefferson's testimony, lengthy and detailed, also constitutes evidence of probative force to support the jury's findings of negligence and proximate cause. Also it is our view that Dr. Beall's own testimony is corroborative of Mrs. Jefferson's in important respects. Where Dr. Beall's testimony differs from Mrs. Jefferson's it is apparent that in such respects, the jury being the judge of the credibility of the witness and of the weight to be given their testimony, apparently gave greater credence and greater weight to the testimony of Mrs. Jefferson than to the testimony of Dr. Beall. Also Mrs. Jefferson testified positively as to physical pain suffered by her as a result of the treatment given her by appellant for her supposed but not actual pregnancy, and she also testified to the various details with respect to the mental pain and anguish suffered by her as a result of Dr. Beall's actions and treatment during her alleged but not

actual pregnancy. Mrs. Bolin and Mrs. Castille also testified with reference to Mrs. Jefferson's hysterical and nervous condition shortly after she had been informed by Dr. Beall that she was not pregnant. Appellant's second point is overruled.

Mrs. Jefferson's testimony clearly shows that she suffered phyical pain on many occasions during her treatment by Dr. Beall during the period in question. The record is also clear that also on the two occasions when Mrs. Jefferson was placed in Dr. Beall's hospital, and prepared for delivery, that she suffered physical pain. The record also clearly shows mental pain and mental anguish on the part of Mrs. Jefferson as shown by the events following her release from Dr. Beall's hospital on April 19, 1962, after he informed Mrs. Jefferson that she was not pregnant, and after Dr. Beall had treated her and carried her through a mis-diagnosed alleged pregnancy from October 29, 1961, through April 19, 1962. Appellant's third point is overruled.

The judgment of the trial court is affirmed.

/s/ WM. J. FANNING

Associate Justice

July 27, 1965.

Filed July 27, 1965.

(Not to be published—Rule 452, T.R.C.P.)

THE STATE OF TEXAS
COUNTY OF BOWIE

I, LOUISE GILMER, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original opinion of this Court as filed herein on July 27th, A. D., 1965, in cause No. 7659, styled John R. Beall, Appellant, vs. Bob T. Jefferson, Appellee, as the same now appears on file in my office.

IN TESTIMONY WHEREOF, witness my hand and official seal at office in the City of Texarkana, Texas, this the 23rd day of December, A. D., 1965.

/s/ LOUISE GILMER

Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas.

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APPENDIX II

FILED
IN SUPREME COURT
OF TEXAS
SEPT. 30, 1965
GEO. H. TEMPLIN, Clerk
By DEPUTY

No. A-11037

In the
SUPREME COURT OF TEXAS

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

RESPONDENT'S MOTION TO DISMISS PETITIONER'S APPLICATION FOR WRIT OF ERROR

To the Honorable Justices of the Supreme Court:

NOW COMES BOB T. JEFFERSON, Respondent herein, and moves the Court to dismiss the Application for Writ of Error of Petitioner, John R. Beall, and as grounds therefor would respectfully show the Court the following:

I.

The three points of error contained in Petitioner's Application for Writ of Error were not assigned as error in the Motion for Rehearing filed by Petitioner in the Court of Civil Appeals, a copy of which is attached to this motion as

Exhibit "A", and therefore Respondent respectfully submits that this Honorable Court is precluded from considering Petitioner's points of error.

II.

Petitioner's Motion for Rehearing did not comply with Rule 458 of the Texas Rules of Civil Procedure in that Petitioner did not distinctly specify assignments of error which he relied upon, and therefore the points of error contained in Petitioner's Application for Writ of Error are not germane to anything assigned as error in his Motion for Rehearing in the Court of Civil Appeals as required by Rule 469(c) of the Texas Rules of Civil Procedure, and this Honorable Court is therefore precluded from considering the points of error in the Application for Writ of Error herein. *East Texas Motor Freight Lines vs. Loftis*, 148 Tex. 242, 223, SW2, 613 (1949).

WHEREFORE, Respondent respectfully prays that Petitioner's Application for Writ of Error be dismissed.

/s/ DAN W. STANSBURY
DAN W. STANSBURY
2110 Republic National Bank Tower
Dallas, Texas 75201

/s/ WILLIAM F. TUCKER
WILLIAM F. TUCKER
336 Fidelity Union Tower Building
Dallas, Texas 75201

A true and correct copy of the foregoing Respondent's Motion to Dismiss Petitioner's Application for Writ of Error has this 30th day of September, 1965, been mailed to Flannigan, Patterson and Biesel, Attorneys for Appellant at 267 Exchange Park North, Dallas, Texas.

/s/ DAN W. STANSBURY

Exhibit "A"

No. 16,538

In the
COURT OF CIVIL APPEALS
for the Fifth Supreme Judicial District of

JOHN R. BEALL,

Appellant,

v.

BOB T. JEFFERSON,

Appellee.

Appeal from the District Court of Dallas, County, Texas, for the 95th Judicial District

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MOTION FOR RE-HEARING

To the Honorable Court of Civil Appeals for the Sixth Supreme Judicial District of Texas:

This Honorable Court's opinion of July 27, 1965, completely avoids the heart of the issues presented by Appellant's Brief on file herein. The final insult of the opinion is embodied in the Court's reference to Rule 452, T.R.C.P., implying that the case presents nothing of material import to the jurisprudence of this state and that, therefore, it would serve no useful purpose to refer the opinion for publication.

How it is possible for this Honorable Court to disregard the pronouncements of the Supreme Court of Texas in *Bowler v. Bourden*, 148 Tex. 1, 219 SW(2d) 779, requiring the showing of casual connection between the negligence found and the damages alleged is beyond comprehension. The court's opinion does not even seek to dignify the rights of the litigants by recognizing the established rules of law.

It is well recognized that in any case before an Appellate Court, it is possible for the Appellate Court to reach any conclusion it chooses, if that Court is willing to ignore the facts, place itself in the jury box and reappraise the facts, and to disregard the rules of law applicable to those facts. Such procedure is most effective in clearing the Appellate Court's docket, but it hardly does justice to the litigants, to counsel, nor the trial court.

In the instant case, the Court disregards the requirement that only competent testimony by medical experts has any probative value in determining the existence or non-existence of medical facts and substitutes for that rule a new and unique approach, allowing one of the litigants to make her own diagnosis and accepting the lay testimony of one totally unskilled in medicine to establish medical facts. Furthermore, the Court disregards, contrary to the established rules, the conflict contained within that lay testimony. Specifically, the Court disregards Mrs. Jefferson's testimony to the effect that in her opinion, she was pregnant; testimony which she cannot thereafter contradict by implication or by suggestion that she did not know.

The essence of this appeal deals with causation. The Court's opinion does not even mention causation, casual connection, or even remotely face up to the true issue of the case in any way. It does not answer the points presented, nor even face the issues presented by those points. Although the opinion recites the points, it proceeds to talk all around them without dealing squarely with them, nor the legal questions they present.

WHEREFORE, PREMISES CONSIDERED, the Appellant prays that the Court's opinion of July 27, 1965, be withdrawn and that a re-hearing be granted herein, and that after such re-hearing, the judgment of the trial court below be reversed and a new trial granted to the end that justice may be done.

Respectfully submitted,

FLANNIGAN & BIESEL,
267 Exchange Park North,
Dallas, Texas FL 7-5676,

By: /s/ GEO. E. FLANNIGAN
Geo. E. Flannigan
Attorneys for Appellant.

A copy of the above and foregoing Motion has been served upon the Appellee herein by delivering a true copy therof to Messrs. Dan W. Stanbury and William F. Tucker, Attorneys for Appellees, Fidelity Union Life Building, Dallas, Texas, this 5th day of August, 1965, by depositing a copy of same in the United States Mail.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing six (6) pages contain a true and correct copy of the respondent's motion to dismiss petitioner's application for writ of error in the case of John R. Beall vs. Bob T. Jefferson, No. A-11,037, From Dallas County, Sixth District, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 3rd day of December, 1965.

GEO. H. TEMPLIN, CLERK

/s/ EUGENE CERVENKA

By Eugene Cervenka, Deputy.

Seal

APPENDIX III

FILED
IN SUPREME COURT
OF TEXAS
NOV. 18, 1965
GEO. H. TEMPLIN, Clerk
By DEPUTY

A 11037

Motion for Rehearing—Appn.

No. A-11037

In the
SUPREME COURT OF TEXAS

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

PETITIONER'S MOTION FOR REHEARING OF THE ORDER OF NOVEMBER 3, 1965, DISMISSING HIS APPLICATION FOR WRIT OF ERROR FOR WANT OF JURISDICTION AND OF THE CAUSE

To The Honorable Supreme Court of Texas:

Now comes John R. Beall, petitioner in the application for writ of error proceedings filed and pending in the above entitled and numbered cause and files and presents this his motion for rehearing of the order of November 3, 1965, dis-

missing his application for writ of error for want of jurisdiction and of the cause and as grounds for said motion respectfully presents:

I.

The failure of attorneys, who prior to the presentation of this motion for rehearing, represented petitioner in this litigation, to present appropriate assignments of error in the motion for rehearing in the Court of Civil Appeals and the action and order of this Court of November 3, 1965, dismissing Petitioner's Application for Writ of Error for want of jurisdiction on account of such failure of such attorneys, deprived petitioner of due process of law and this Court having the authority and duty to grant this motion for rehearing, and afford petitioner due process of law, is required to do so as a non discretionary matter.

II.

The failure of attorneys, who prior to the presentation of this motion for rehearing, represented petitioner in this litigation, to implement the established proper methods of law to present to all tribunals of the state judicial system of Texas through which this judicial proceeding has been implemented, towit, the trial court, the Court of Civil Appeals and this, the Supreme Court of Texas for the consideration and determination by said courts, as a matter defensive of Respondent's claim against Petitioner, the substantive rule of law which was and is applicable in the circumstances of the operative facts shown by the record and relied on by Respondent for recovery on said claim as to the standard or

level of conduct with which Petitioner was under legal duty to implement with respect to Respondent's wife in Petitioner's course of treatments of her, said substantive rule of law being: (a) Petitioner was under legal duty to have had at the time and on the occasions of the treatments of Respondent's wife, the training, experience, knowledge and skill prescribed by the applicable statutes of the State of Texas and the Board of Medical Examiners of the State of Texas for persons who are permitted license under such statutes by said Board to administer such medical treatments as Petitioner administered to Respondent's wife and (b) Petitioner was under legal duty to administer such course of treatments to Respondent's wife in accordance with some method of medical theory and practice approved and accepted by any segment, whether a majority or a minority—of persons practicing the same theory of medical science as that which was practiced by Petitioner and selected and implemented for and in the treatment of Respondent's wife by Petitioner as a result of Petitioner's exercise of his good faith judgment of a proper and adequate course of treatment for Respondent's wife under all the circumstances in the event of Petioner's maintenance of which standards or levels of conduct in the administration of such course of treatments of Respondent's wife, Petitioner would not be liable to Respondent on the latter's claim as a matter of law—deprived Petitioner of due process of law and this Court having the authority and duty to grant this motion for rehearing and afford to Petitioner due process of law, is required to do so as a non discretionary matter.

III.

In the event that this Court should conclude that the deprivations of Petitioner of due process of law set forth and complained of in paragraphs I and II above can be afforded to Petitioner by a remanding of this cause to the Court of Civil Appeals with an order that a motion for rehearing be permitted to be filed on behalf of Petitioner without the hiatusses in the motion for rehearing which resulted in this Court's dismissal of the Application for Writ of Error in the event Petitioner's present counsel should elect to file such a motion for rehearing in such eventuality and that the cause proceed thenceforth through the Court of Civil Appeals and in this Court in the same manner as if such motion for rehearing had been filed in due form, substance, time and order, when this cause was pending before the said Court of Appeals awaiting the filing and other due procedure with respect to such motion for rehearing, to all of which we object for the reason that such procedure is not authorized by law nor would same afford petitioner the due process of law of which he has been deprived, Petitioner would respectfully tender to this Court as the substantive part of such motion for rehearing which he would file in such eventuality in the Court of Civil Appeals, the assignments of error and materials in support of same, which are set forth in the Application for writ of error on file herein.

AUTHORITIES AND ARGUMENT IN SUPPORT OF ALL ASSIGNMENTS OF ERROR

The Due Process of Law Clause was first introduced into the Constitution of the United States as part of the Fifth

Amendment which was adopted shortly after 1789 in order to establish a minimal standard or level at which all methods of law of our federal governmental system were required to be established and implemented in order to be valid. Establishment of such minimal standard or level for all federal official conduct stemmed from the distrust which the then members of our society had of all central governmental officials because such members of our society identified such central government and its officials with the English Governmental system and its officials whose tyrraneous conduct was still fresh in their memories. When the first case under such clause reached the Supreme Court of the United States, the Court stated in its decision "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process." Den vs. Hoboken Land and Improvement Co., (1836) 59 U.S. 272, 276. With the adoption of the Fourteenth Amendment in 1868 such Due Process of Law Clause was established as a minimal standard or level at which all methods of law of our state governmental system were required to be established and implemented in order to be valid. Establishment of such minimal standard or level for all state official conduct stemmed from the distrust which the members of our society of the Northern States had of the members of our society of the Southern States who had been compelled by the results of the recently ended Civil War to free all negro slaves and orientate them into the society of their recent white owners as full citizens. The clause occurrent in the Fifth Amend-

ment has come before courts for interpretation most infrequently but occurrent in the Fourteenth Amendment it has come before many courts in many cases with ever increasing frequency. Such clause has not yet been defined nor very articulately described in any court decision whatsoever. The best that has been done by any court with respect to a definition or description of said clause is the language of the courts which states that its substance is *fundamental fairness*. For the purpose of this motion for rehearing, we will make no effort to a more articulate definition or description of such clause than to say that almost fifteen years ago on account of a collocation of circumstances which seemed to me to compel that I find an articulate and valid definition of such clause, I began and have continuously pursued since an effort to find such a definition for such clause. In my efforts which have carried my research into every field of human knowledge, I have found that all societal systems which have ever obtained since human life in groups began on Earth and all that shall ever obtain so long as human life in groups on Earth continues, have had and will have as their foundations, the conceptualizations which at the time of obtention of a considered method of societal system, which obtained in the spiritual-psychomatic energy systems of human beings with respect to the universe and every phenomena in it, including the spiritual-psychosomatic energy system of the human being conceptualizing the universe and every phenomena in it. Under such foundational principle which is universal in every respect the foundation of our present societal systems should be the conceptualization that human beings now have of the universe and every phenomena in it, in-

cluding the spiritual-psychomatic energy systems of the human being conceptualizers through the methods of modern science which includes abstract mathematics, relativity, quantum mechanics, unified field and the like but such is not its foundation. And it is for such reason, that there is unrest around the Earth, both between and within about every national total method of societal system, which causes wars between such nations and high crime rates, juvenile delinquency and other disorders within such nations. If, as and when an Earth wide total method of societal system can be conceptualized, established and implemented amain with the last above mentioned conceptualization of the universe and every phenomena in it etc. as a foundational basis all the disorders between and within the nations of the Earth will cease. Hence due process of law which is the standard or level at which all methods of both our federal and state governmental system are required to be established and implemented in order to be valid must also take its content and be defined with respect to the above mentionel conceptualization of the universe and every phenomena in it. Implementation of such changes in the societal systems now obtaining on Earth is no doubt going to be most difficult. Indeed I would say that such would be impossible except for the fact that Earth's society cannot continue unless such changes are implemented. Since, therefore, same are necessary, they will be made. The developments in court decisions within the last three or four decades toward a more extensive use of the due process of law clauses has in the main been in connection with state court criminal proceedings which have reached the Supreme Court of the United

States on a due process of law question. All of such decisions have had as their foundation rationale, regardless of the language used and the circumstances of the operative facts of the litigation, the absence from the total method or process of law by which a criminal sanction had been imposed on a member of society of some ingredient which made it seem to such member of society and any objective observer that such process of law had been either established or implemented with fundamental unfairness to such "sanctioned" member of society. In the matter of which petitioner herein complains the method of law was not implemented merely with seeming fundamental unfairness to petitioner but it was not implemented at all. Nor does the fact that such hiatus in the implementation of these judicial proceedings was caused by an attorney of Petitioner's own selection and employment militate against the idea that Petition was deprived of due process of law, which this Court should afford him by the granting of this motion for rehearing for the reason that several of the absolute, authoritarian concepts whereof the judicial process in our judicial systems and particularly in our state judicial systems is established and implemented, such as the free enterprise method for producing, distributing and consuming goods, wares and services, State's Rights, judicial immunity, res judicata, collateral attack and the like must be modified in accordance with other aspects of the essential changes above mentioned. This Court has both the authority and the duty to grant this motion for rehearing and afford petitioner the due process of law of which he has been deprived as set forth in paragraphs I and II above. Article VI of the Constitution of the United States and

Frank vs. Mangrum, 236 U.S. 309, 327, 328. It is respectfully suggested and requested that the Court deviate from its traditional course with respect to motions for rehearing by setting this cause down for full briefing and oral argument so that the ideas herein adumbrated can be presented in articulateness and completeness.

Wherefore, petitioner prays that this motion for rehearing be granted, or alternately that same be set down for briefing and oral argument on a show cause why it should not be granted with relief appropriate to such alternative in which rehearing is granted.

/s/ CURTIS E. HILL

CURTIS E. HILL,
605 North Ervay,
Dallas 1, Texas,
Attorney for Petitioner.

A copy of the above motion has been delivered by me personally to each of the two counsel of record for respondent, this the 18th day of November, A. D. 1965.

/s/ CURTIS E. HILL

Curtis E. Hill

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing six (6) pages contain a true and correct copy of the petitioner's motion for rehearing in the case of John R. Beall vs. Bob T. Jefferson, No. A-11,037, From Dallas County, Sixth District, as the original of same appears of record on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 3rd day of December, 1965.

GEO. H. TEMPLIN, CLERK
/s/ EUGENE CERVENKA
By Eugene Cervenka, Deputy.

Seal

APPENDIX IV

Judgment

BE IT REMEMBERED, that on Tuesday, the 27th day of July, A. D., 1965, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana, Texas. Present T. C. Chadick, Chief Justice, Wm. J. Fanning, Associate Justice, Matt Davis, Associate Justice, and Louise Gilmer, Clerk, when the following proceedings, among others, were had, to-wit:

No. 7659

JOHN R. BEALL,

Appellant,

v.

BOB T. JEFFERSON,

Appellee.

Appealed from the District Court of Dallas County.

This cause came on to be heard on the transcript and the record, and the same being inspected, it is the opinion of the Court that there was no error in the Judgment. It is therefore considered, adjudged and ordered that the judgment of the Court below be in all things, affirmed; that the appellee, Bob T. Jefferson, recover of and from the appellant,

John R. Beall, and from National Surety Corporation, surety upon appellant's cost bond, all costs in this behalf expended, both in this Court and the Court below, for all of which execution may issue; and, that this decision be certified to the Court below for observance.

Be it remembered that on Monday, the 16th day of August, A. D., 1965, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Texarkana, Texas. Present: T. C. Chadick, Chief Justice; Wm. J. Fanning, Associate Justice; Matt Davis, Associate Justice; and Louise Gilmer, Clerk.

It is ordered by the Court that the following styled and numbered motion be and the same is hereby submitted:

No. 11,393-7659

JOHN R. BEALL

v.

BOB T. JEFFERSON

From District Court of Dallas County.

Appellant's motion for rehearing.

Be it remembered that on Tuesday, the 17th day of August, A. D., 1965, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Tex-

arkana, Texas. Present: T. C. Chadick, Chief Justice; Wm. J. Fanning, Associate Justice; Matt Davis, Associate Justice; and Louise Gilmer, Clerk.

No. 11,393-7659

JOHN R. BEALL,

Appellant,

v.

BOB T. JEFFERSON,

Appellee.

Appealed from District Court of Dallas County.

This cause came on to be heard on the transcript of the record and appellant's motion for rehearing, and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby OVERRULED.

APPENDIX V

SUPREME COURT OF TEXAS

November 3, 1965

No. A-11,037

JOHN R. BEALL

v.

BOB T. JEFFERSON

From Dallas County, Sixth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Sixth Supreme Judicial District, together with motion of respondent to dismiss said application, having been duly considered, it is ordered that the motion be, and hereby is, GRANTED, and the application accordingly be, and hereby is, dismissed for want of jurisdiction.

It is further ordered that applicant, John R. Beall and his surety, National Surety Corporation, pay all costs incurred on this application.

December 1, 1965

No. A-11,037

JOHN R. BEALL

v.

BOB T. JEFFERSON

From Dallas County, Sixth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1076

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS G. NASH, JR.,
336 Fidelity Union Tower,
Dallas, Texas 75201,
Attorney for Respondent.

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1076

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas

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RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT

Respondent, Bob T. Jefferson, sued petitioner, John R. Beall, for damages resulting from petitioner's negligence in diagnosing and treating respondent's wife, Alta Lee Jefferson. The Court properly charged the jury as to the degree

of care required of petitioner as a medical doctor practicing in Dallas County, Texas, and after hearing all the testimony, including testimony by another medical doctor, the jury found petitioner was negligent and that such negligence was a proximate cause of the damages found by the jury to have been sustained by respondent.

REASONS FOR DENYING THE WRIT

The petitioner's first question regarding the failure of petitioner's former counsel to present points of error in his motion for rehearing in the Court of Civil Appeals, and the resulting dismissal by the Supreme Court of Texas of petitioner's application for writ of error for want of jurisdiction, is in effect raising the question of whether the failure to have another hearing in the Supreme Court of Texas after having previously had full and complete hearings in both the trial court and the Court of Civil Appeals, deprived petitioner of due process of law.

It has previously been held that the right of appeal or review is not essential to due process, provided due process has already been accorded in the tribunal of first instance, *District of Columbia v. Clawans*, 300 U.S. 617, 81 L. Ed. 843, 57 S. Ct. 660; *Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 74 L. Ed. 710, 50 S. Ct. 228; *Luckenbach S. S. Co. v. United States*, 272 U.S. 533, 71 L. Ed. 394, 47 S. Ct. 186, and no violation of constitutional law is involved in a court's insistence that a statutory right of appeal be exercised according to the lawful rules of the Court. *Meyer v.*

Territory of Hawaii, 164 F. 2d 845 (9th Cir. 1947), cert. den. 333 U.S. 860, 92 L. Ed. 1139, 68 S. Ct. 738.

In answer to petitioner's second question, respondent, in addition to the argument and authorities presented above in answer to the first question, submits that the record shows petitioner was adequately represented by counsel of his own choice both in the trial court and the Court of Civil Appeals. The jury in the trial court, in finding that petitioner's acts and omissions amounted to negligence, found that petitioner failed to exercise that degree of care which would be exercised by an ordinarily prudent medical doctor in Dallas County, Texas, under the same or similar circumstances, as the jury was instructed by the Court that "negligence", as that term is used in the Court's charge to the jury, means "the failure to exercise ordinary care", and that "ordinary care", as that term is used in the Court's charge, means "that degree of care which would be exercised by an ordinarily prudent medical doctor in Dallas County, Texas, under the same or similar circumstances" (R. Vol. I—page 31). The burden was on respondent to plead and then prove, by a preponderance of the evidence, that petitioner was negligent as that term was defined in the Court's charge, and petitioner's counsel, as shown by his pleadings (R. Vol. I—page 13), denied respondent's allegations. This denial placed in issue the question of petitioner's negligence, thus presenting the defensive theory which the jury rejected after hearing both the evidence presented by respondent and the evidence presented by petitioner.

In addition to the foregoing, and without intending in any way to imply that there was ineffective assistance of counsel in this case, respondent would emphasize that all cases cited by petitioner with respect to ineffective assistance of counsel involved criminal offenses.

CONCLUSION

Respondent respectfully submits that no substantial Federal question is involved in this case, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS G. NASH, JR.,
336 Fidelity Union Tower,
Dallas, Texas 75201,
Attorney for Respondent.

I, Thomas G. Nash, Jr., one of the attorneys for Bob T. Jefferson, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 29TH day of March, 1966, I served a copy of the foregoing Respondent's Brief in Opposition on petitioner, John R. Beall, by mailing the copy in a duly addressed envelope, with first class postage prepaid, to Curtis E. Hill, counsel of record for petitioner, at 605 North Ervay, Dallas 1, Texas.

.....
Attorney for Respondent

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1076

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

PETITION FOR REHEARING OF THE ORDER OF APRIL 18, 1966, DENYING PETITION FOR WRIT OF CERTIORARI

CURTIS E. HILL,
3235½ Rosedale,
Dallas, Texas 75205,
Counsel for Petitioner.

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1076

JOHN R. BEALL,

Petitioner,

v.

BOB T. JEFFERSON,

Respondent.

PETITION FOR REHEARING OF THE ORDER OF APRIL 18, 1966, DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that the Court grant rehearing of its order of April 18, 1966, denying the petition for writ of certiorari, that said order of denial be set aside and that a writ of certiorari issue to review the judgment and order of the Court of Civil Appeals for the Sixth Supreme Judicial Distict of Texas at Texarkana, Texas in the above entitled cause as prayed for in the petition for writ of certiorari herein filed on March 1, 1966.

ADDITION TO THE STATEMENT CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI AT PAGES 5 AND 6

On account of the hurriedness with which the petition for writ of certiorari was completed and filed herein on March 1, 1966, no effort was made to articulate the Statement at pages 5 and 6 of petition for writ of certiorari with the certified copy of the record which was filed with said petition. We have printed as Appendix A hereto to the provisions of the Texas Rules of Civil Procedure which establish and indicate the procedural methods by which petitioner's counsel, prior to motion for rehearing in the Supreme Court of Texas, could have and should have presented to all of the courts of the state judicial system of the State of Texas which had jurisdiction of this litigation, the defensive matter indicated by the Questions Presented and particularly (2) thereof—at pages 3 and 4 of the petition for writ of certiorari, which, had same been properly presented and had any court of the state judicial system ruled correctly thereon, would have caused this litigation to have resulted favorably to petitioner at the pleading stage in probability and at the instructed verdict stage in certainty. We have been unable to devise a more convenient method of showing the Court of the failures of petitioner's said counsel which constitute a deprivation of petitioner of due process of law in the implementation of the judicial proceedings through the courts of the state judicial system than to first present the procedural rules of law shown in Appendix A

and then invite the attention of the Court to the record of such state court judicial proceedings.

Any freshman law school student, as petitioner's counsel would have understood his clear duty to petitioner in the considered circumstances. Furthermore, every freshman law school student understands that assignments of error are foundational to the rule of res judicata; that without the rule of res judicata the judicial process cannot be implemented, and that failure to make assignments of error at each and every procedural opportunity therefor, causes a loss of any error, except such as are fundamental, which are not assigned as a ground for reversal and in consequence, loss of the litigation in which such failure to make assignments of error occurs.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Human beings on Earth everywhere are aware: (1) that under methods established on modern science for the production of goods and services for the satisfaction of human needs and wants, no human being on Earth should be hungry, diseased or poverty ridden; (2) that nevertheless, a great majority of all human beings on Earth are hungry, diseased and poverty ridden, and (3) that in the circumstances of such two facts obtaining at the same time, there can be no cause of a great majority of all human beings on Earth being hungry, diseased and poverty ridden than the inadequacies of the Earth wide total method of societal system now in establishment and implementation. In consequence of such wide differential between the *actual* satisfaction of human needs

and wants and the *potential* satisfaction of human needs and wants and there being no articulate knowledge of how such Earth wide total method of societal system can be so improved that the *actual* satisfaction of human needs and wants can be brought more nearly to the *potential* satisfaction of human needs and wants, there is discontent in human beings everywhere.

During a little more than fifteen years of isolation from the stream of society in this nation and dedicated study to find out a way by which the *actual* satisfaction of human needs and wants can be brought more nearly to the *potential* satisfaction of human needs and wants, undersigned counsel for petitioner has developed articulate knowledge how such gap can be narrowed immediately and closed ultimately. At an early date in an open letter from undersigned counsel to the President of the United States and the Premier of Russia, jointly, a system of concepts will be stated, clearly and articulately, upon which as a foundation, an Earth wide total method of societal system can be established, which in implementation amain will first narrow and then close such gap between the *actual* and *potential* satisfaction of human needs and wants, produce eternal Earth wide peace and continue Earth's society in such further progressiveness as can presently be foreseen and reasonably expected. Such letter will be sent to a long list of the most intellectually aristocratic institutions and personages around the Earth with request for the widest and most intensive publicity possible of such system of concepts and how and why an Earth wide total method of societal system estab-

lished on same as a foundation will implement the objectives above stated in order that all of same may be refuted in Earth wide public opinion and if same cannot be refuted in Earth wide public opinion—and they cannot be and therefore, will not be—then there will be no alternative to the establishment and implementation of an Earth wide total method of societal system. Such course would certainly be most proper just now as an alternative to war.

The only agency on Earth which can make an authoritative statement of such system of concepts is this Court in litigation brought before it on questions of deprivation of due process of law for the reason that every method in such Earth wide total method of societal system, whether it be implementary of an objective of human desire, or coercive of human beings on Earth, will necessarily be implemented at the standard or level of due process of law, conceptualized under the methods of modern science.

In every litigation where this Court has determined that a participating litigant has been deprived of due process of law, the underlying consideration which has been controlling of this Court's such determination has been, not the fact that the participating litigant has been deprived of a right under our national total method of societal system to which he was entitled but the fact that by the exercise of federal or state power in depriving such participating litigant of due process of law, our nation's society was deprived of a right without the obtention of which our national total method of societal system could not continue. In the New York Times Company v. Sullivan case, which is cited at page 7 of the petition

for writ of certiorari filed herein, while the petitioner was the participating litigant who was deprived of due process of law by the state courts of the State of Alabama in the course of the litigation through the state judicial system of the State of Alabama, the consideration which controlled this Court's determination that petitioner was deprived of due process of law and therefore, entitled to reversal of the judgment of the Alabama state courts, was that in depriving petitioner of due process of law, the Alabama state courts, deprived our nation's society of a method of our national total method of societal system, without which in obtention, our national total method of societal system could not continue. In the instant case, the courts of the state judicial system of the State of Texas, in depriving petitioner, who was the participating litigant in the litigation through the state judicial system, deprived our nation's society of medical skills and services, without which our national total method of societal system cannot continue. Such view of due process of law—conceptualized under the methods of modern science as such concept of due process of law must be, is the key and controlling concept of the system of concepts upon which the Earth wide system hereinabove mentioned must be founded. Therefore, accordingly, it is a matter of Earth wide and universal public importance that this Court take jurisdiction of this litigation, the determination of which will inevitably require and include this Court's articulate statement of the system of concepts upon which such Earth wide total method of societal system as a matter of organic necessity must be established and implemented.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted of the order of April 18, 1966, denying the petition for writ of certiorari, that upon such rehearing said order of denial be set aside and that a writ of certiorari be issued to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas, or, alternatively, that this cause be set for oral argument on a rule to show cause why the orders immediately above described and prayed for should not be made and entered herein.

Respectfully submitted,

CURTIS E. HILL,
3235½ Rosedale,
Dallas, Texas 75205
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for rehearing of the order of April 18, 1966, denying petition for writ of certiorari, has been mailed—first class—on May 16, 1966 to Thomas G. Nash, Esquire, 336 Fidelity Union Tower Building, Dallas, Texas 75201, who is counsel of record for respondent.

.....

CURTIS E. HILL

APPENDIX A

Rule 85. Original Answer; Contents

The original answer may consist of pleas of privilege, to the jurisdiction, in abatement, or any other dilatory pleas; of special exceptions[,] of general denial, and any defense by way of avoidance or estoppel, and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

Rule 90. Waiver of Defects in Pleading

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by motion or exception in writing and brought to the attention of the Judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the rendition of judgment, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

Rule 91. Special Exceptions

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to. Amended by Order of March 31, 1941.

Rule 92. General Denial

A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. Where the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

Rule 94. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists. Amended by Order of March 31, 1941.

Rule 268. Motion for Instructed Verdict

A motion for directed verdict shall state the specific grounds therefor.

Rule 320. Motion

New trials may be granted and judgment set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall be in writing and signed by the party or his attorney and shall specify each ground on which it is founded, and no ground not specified shall be considered. As amended by order of July 20, 1954, effective Jan. 1, 1955.

Rule 321. Form

Each ground of a motion for a new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such way as that the point of

objection can be clearly identified and understood by the court.

Rule 322. Generality To Be Avoided

Grounds of objections couched in general terms—as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like—shall not be considered by the court.

Rule 418. Briefs: Contents

The brief for appellant should contain in the order here stated:

(a) A short, plain statement of the nature of the case without argument. A resume of the pleadings or evidence is seldom necessary and should be avoided.

(b) A statement of the points upon which the appeal is predicated, separately numbered in short form and without argument, and germane to one or more assignments of error when assignments are required. Such points will be sufficient if they direct the attention of the court to the error relied upon and they should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief. Assignments of error need not be copied in the brief, and may be cited by reference only.

(c) A brief of the argument, presenting separately or grouped, if germane, the points relied upon for reversal, the argument to include (i) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (ii) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any charge given or refused, such charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. As

amended by order of March 31, 1941; order of Sept. 20, 1941, effective Dec. 31, 1941.

Rule 458. Motion and Second Motion for Rehearing

Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may, * * * file with the Clerk of the said court his motion in writing for a rehearing thereof, in which the assignments of error relied upon for the rehearing shall be distinctly specified, * * *

Rule 469. Requisites of Application

The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a conflict of decisions under Subdivision 1 of Article 1821, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where the case is one coming within the provisions of Subdivision 1 of Article 1821, and jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof of a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited.

(f) If any brief, or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn. Amended by Order of March 31, 1941; also by order of September 20, 1941, effective December 31, 1941.

Rule 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused". In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for want of juridiction."

Rule 515. Motion for Rehearing

A motion for rehearing may be filed with the clerk of the Court within fifteen days after the date of rendition of the judgment or decree of the court or the order refusing or dismissing an application for writ of error whether such date be in the same term or a succeeding term of such court * * * The grounds relied on for the rehearing shall be distinctly specified in such motion.